BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 158

SEWARD K. LOWE, AND SUSAN LOWE, *Petitioners,*

vs.

ALEXANDER J. DICKSON, *Respondent.*

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

ANSWER OF RESPONDENT TO THE PETITION FOR WRIT OF CERTIORARI.

PATRICK H. LOUGHRAN,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATUTES CITED.

CASES CITED.

BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1925.

SEWARD K. LOWE, AND SUSAN LOWE, *Petitioners,*

v.

ALEXANDER J. DICKSON, *Respondent.*

No. 580.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

ANSWER OF RESPONDENT TO THE PETITION

Alexander J. Dickson, by his attorney, in answer to the petition for writ of certiorari herein, respectfully shows:

That the clerk presented the petition on October 5, 1925. That the record was not printed at the time (October 22, 1925) when this answer to the petition was drafted. Nor was the record as filed in the clerk's office accessible to respondent's counsel at that time.

The Matter of Law on Which the Petitioner Seeks the Opinion of This Court.

The dominant question in the case—the only question which the petitioners seek to have this court consider—is an unmixed question of law, to wit, did the act of Congress of May 22, 1902, Chap. 821, 32 Stat. 203, confirm and validate a concededly void homestead entry which a Register and Receiver of a local United States Land Office in Oklahoma inadvertently and erroneously permitted to be made on March 3, 1902, under an application for entry which contained in itself all the facts essential to proof of the invalidity of any entry allowed thereunder. The District Court of Beaver County, Oklahoma, and that State's Supreme Court were of the same mind with respect to the aforesaid question of law, those two courts deciding that the entry was void on its face and that said statute was not curative legislation and, therefore, did not validate such entry. The petitioners contend that the said statute was validating or curative legislation and, therefore, that the two courts below were guilty of error prejudicial to the rights of the petitioners.

THE MATERIAL FACTS IN THE CASE

The facts material here are these:

March 3, 1902, the respondent filed in the local land office an application for second homestead entry which fully described a homestead entry of 160 acres theretofore made by him and under which a patent had issued to him. Having already exercised and exhausted his right under the homestead laws, and having in his application for second entry expressly shown that he had done so, the respondent was wholly disqualified to make a second homestead entry. Revised Statutes, Sec. 2298, reads as follows:

> "No person shall be permitted to acquire title to more than one quarter section under the provisions of this chapter."

But notwithstanding the law's express prohibition of a second entry, respondent's said application for such entry (an application containing in itself proof of his disqualification), was erroneously entertained when it should have been rejected, and a homestead entry of 160 acres thereunder was inadvertently permitted on March 3, 1902. (P. 3 of petition.)

March 11, 1902, (p. 3 of the petition) the respondent was notified by the Register and Receiver "that the Commissioner (meaning the Commissioner of the General Land Office) will doubtless hold that the H. E. No. 11185 for cancellation and that he (the respondent) has a right to relinquish and make application for the return of his fees and commissions."

Seemingly agreeing with the Register and Receiver that the homestead entry which was made on March 3, 1902, was void, the respondent took no action whatever under such notification. He signified by his attitude of silence that he would uncomplainingly acquiesce in "cancellation" of the entry. He did nothing whatever to oppose "cancellation." Apparently he was willing that "cancellation" should be ordered and expected that it would be ordered. But the General Land Office did not order "cancellation" of the entry. That it should have taken some action that would have cleared its records and those of the local office of the inadventently allowed and void entry is perfectly apparent.

And solely because the General Land Office failed to take action clearing its records of the void entry, such entry was still of record on January 28, 1905, when the petitioner here (as he says at p. 4 of his petition) "filed a contest upon the sole and only ground that Dickson had not cultivated the land and had abandoned the same." A contest is a proceeding in rem—a proceeding against an entry—and has as its objective an order of cancellation of the entry because of a default on the part of the entryman

thereunder. There can be no default under a void entry, for an entry that is a nullity does not impose any legal requirement or obligation. Moreover, a person who has been authoritatively notified that his homestead entry will "doubtless" be adjudged a void entry and apparently agrees that the entry should be so adjudged, is not very likely to reside upon and cultivate the land embraced in the void entry. To do so would be to establish residence and to cultivate without any protection whatever under any lawful filing or claim.

After decision by the Register and Receiver in the contest proceeding (the decision being that the charges of non-residence and non-cultivation under the void entry had been sustained), the respondent filed a motion for rehearing contending that his entry was a nullity—was void on its face—and, therefore, that the petitioner could obtain no right whatever by a contest against it. Such motion was denied by the Register and Receiver. The respondent then appealed to the General Land Office and there made the same contention. He appealed to the Secretary of the Interior and made the same contention before that officer. But both the Commissioner and the Secretary held the contention to be meritless.

At pp. 27 and 28 of the petition it is said:

> "That is was not until July, 1906, that plaintiff asserted the invalidity of his entry No. 1185, when it became apparent that the Department would cancel said entry."

The aforesaid statement might create a false impression if the court should be without knowledge of the fact that the invalidity of the entry was urged upon the Register and Receiver in the contest proceeding previous to notice of that proceeding by the Commissioner of the General Land Office and the Secretary of the Interior. The Supreme Court of Oklahoma found (p. 33 of the petition):

"But it appears that early in the contest proceeding, plaintiff was asserting that his entry of March, 1902, was void."

It was in July, 1906, that the respondent (then qualified by reason of the provisions of the statute of 1902 to make a second homestead entry), applied to enter the land as a homestead. And, as found by the Supreme Court of Oklahoma, "plaintiff (respondent) occupied the land under his claim (his July, 1906 application) until the year 1917", that being the year in which certificate of final entry issued to the petitioner under the entry he made in the exercise of his alleged preference right as a successful contestant of a void entry.

The application for second entry which the respondent filed in July, 1906, was rejected by the land department upon the stated ground that the void entry which was made in 1902 was operative and effective to segregate the land from the unappropriated public domain and, therefore, that until an order of "cancellation" thereof had been entered the land described therein was not available for entry under any law. But notwithstanding said judgment by the land department, the respondent remained in occupancy of the land under the July, 1906, application for entry.

On August 5, 1910, the land department, it having theretofore rejected the respondent's application for second homestead entry which he filed in July, 1906, allowed petitioner to make a homestead entry under which a certificate of final entry issued on July 19, 1917, and patent issued on April 13, 1918. It was to obtain a decree that petitioner was a trustee of the title for the respondent that the latter instituted this litigation on July 19, 1917, date of issue of the certificate of final entry to the petitioner.

From the foregoing recital of the facts it is evident that the petitioner sought a preference right of entry under the second section of the act of May 14, 1880 (Chap. 89, 21 Stat. 140), through contest against an entry which was void on

its face, and that the respondent applied for entry upon the sound basis that the void entry of 1902 was inoperative and ineffective, per se, to remove the land from the class of unappropriated, vacant public land open to homestead entry and settlement. The petitioner claimed under a preference right as a contestant; a right which cannot accrue until after "cancellation" of the entry contested. His alleged right, therefore, accrued in July, 1910, when the void entry was "canceled." The respondent claimed under both an application to enter which he filed in July, 1906, and a settlement upon the land which, as the Supreme Court of Oklahoma found, was continued until 1917. Hence the respondent's right as an applicant and actual settler accrued four years before accrual of the alleged right of the petitioner as a successful contestant. From which it is manifest that seniority of claim has always been with the respondent.

ARGUMENT

I. The Petitioners' Contention That the Second Homestead Entry Statute of 1902, Supra, Was Confirmatory and Curative of Void Entries Made Before Its Enactment.

The land department has never decided that the act of May 22, 1902, supra, was retrospective in operation and confirmatory and curative with respect to entries allowed prior to that date and void on their face. Said act is entitled "An Act To Allow The Commutation of and Second Homestead Entries In Certain Cases." Its provisions, so far as material here, are these:

> "Sec. 2. That any person who, prior to the passage of an Act entitled 'An Act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose,' "approved May seventeenth, nineteen hundred, having made a homestead entry and perfected the same and acquired title to the land by final entry by having paid

> the price provided in the law opening the land to settlement, and who would have been entitled to the provisions of the Act before cited had final entry not been made prior to the passage of said Act, may make another homestead entry of not exceeding one hundred and sixty acres of any of the public lands in any State or Territory subject to homestead entry:"

It is obvious that the aforesaid provisions of law do not expressly or impliedly refer to void entries. They simply remove a disqualification to make entry. They permit in the future what was forbidden by law in the past. It is fundamental and elementary that a statute is not to be construed retrospectively, unless no other meaning can be given it, or unless the express or necessarily implied intention of the legislature cannot be otherwise satisfied.

But the petitioner insists that the land department has construed the act of 1902 as confirmatory and curative. The cases he cites in an attempt to justify such insistence do not either justify or excuse it. They fail utterly to show that the land department ever declared the act of 1902 to be confirmatory and curative. All three of them were decided previous to enactment of the statute of 1902. In John J. Stewart, (9 L. D., 543), Stewart procured a homestead entry on November 19, 1872, upon a false representation, to wit, that he had never perfected or abandoned a previous homestead entry. As a matter of fact he had abandoned a homestead entry which he made on December 5, 1868. Hence the entry of November 19, 1872, was not void on its face, but voidable for fraud. Moreover he had resided upon and cultivated the land embraced in such voidable entry. In the Stewart case the department had under consideration the second section of the act of March 2, 1889 (Chap. 381, 25 Stat. 854), but did not decide that the said act was confirmatory and curative of Stewart's voidable entry. What was decided was that "under the circumstances of this case" the Stewart entry of Novem-

ber 19, 1872, should not be distrubed. It should not be disturbed because Stewart was residing upon the land covered thereby and that to cancel the entry would in no wise affect Stewart's right immediately to make a new entry thereof under the provisions of the second entry act of 1889. Therefore it would have been a vain and idle thing to have canceled the Stewart entry of November 19, 1872, "under the circumstances of this case."

In George W. Blackwell (11 L. D., 384), Blackwell submitted a final proof under a homestead entry which he had made after "he had previously filed a soldiers declaratory statement on another tract of land." Such proof was rejected by the General Land Office on February 8, 1889, because the filing of the declaratory statement had exhausted Blackwell's right to make entry and, therefore, had disqualified him to make another entry. Without construing the act of March 3, 1889, supra, as confirmatory or curative of void or voidable entries made theretofore, the department, because of the right of second entry conferred by that act and of Blackwell's proof of residence and cultivation under his voidable homestead entry, refused to disturb the entry. To have canceled it would have been idle as Blackwell's residence upon the land and the act of 1889 enabled him immediately to re-enter the land.

In Smith et al., vs. Taylor (23 L. D., 440) the latter had made a homestead entry on April 30, 1889. This entry was not void on its face. It was, however, junior and inferior in right to the right of another and, therefore, was voidable for that reason. It was held for cancellation on February 24, 1893. However, it was not actually canceled until November 22, 1893. The question in Smith vs. Taylor was not whether any act of Congress was confirmatory or curative. It was whether the existence of such voidable—not void—entry on September 16, 1893, disqualified Taylor to make a valid homestead settlement upon and an entry of other lands on that date. The Department held that

the evidence showed that Taylor had in fact abandoned all claim under the voidable—not void—entry of April 30, 1889, before September 16, 1893; that even if the mere irregularity in allowing him to make the second entry before cancellation of the first one was sufficient to require cancellation of the second entry, yet the cancellation "would be without prejudice to his right to make again entry of the same tract, he being the senior settler thereon and his priority of settlement alone giving him priority of right to entry." Therefore, as the department said, "cancellation under these conditions would be a vain act."

But even if it could be shown that the land department had declared the act of 1902 to be confirmatory and curative, the error inhering in such a construction of the statute would be too palpable to require argument in demonstration of it.

II. The Petitioners Say That "The Primary Point for This Court to Determine is the Interpretation of Its Own Opinion" in Prosser v. Finn, 208 U. S., 67.

The opinion in Prosser v Finn, supra, contains nothing that is obscure or ambiguous. Its meaning is express, plain, unmistakable. There an employe of the General Land Office, although disqualified by express law (Revised Statutes, Section 452) to become interested in any of the public lands, made a timber culture entry. After making such entry the employe resigned from the service of the General Land Office. This court decided that the Land Department was right in treating the timber culture entry as invalid even after the person who made it had retired from employment by said office. The following is quoted from the opinion:

> "It may be well to add that the plaintiff's continuing in possession after he ceased to be special agent was not equivalent to a new entry. His rights must be de-

termined by the validity of the original entry at the time it was made."

What this court said in Prosser v Finn, supra, was followed and applied by the two courts below in deciding between the petitioners and the respondent. Those two courts said that the law in effect on March 3, 1902, forbade a second entry by the respondent; that the act of 1902, which removed respondent's disqualification to make second homestead entry, did not affect in the slightest the character in law of the entry by him which was inadvertently allowed when he was disqualified to make such entry; and that said act did not relieve those courts from the duty of deciding, as was decided in Prosser v Finn, to wit, that the validity of an entry must be determined as of the time when it was made.

Petitioner does not desire an interpretation of Prosser v Finn. He desires to have this court overrule Prosser v Finn.

To overrule Prosser v Finn, supra, would require that the court also overrule Waskey v Hammer (223 U. S., 85) and Ewert v. Bluejacket (259 U. S., 129). Waskey v Hammer presented the question whether a mining location was void because made by a United States Deputy Mineral Surveyor in contravention of the provisions of the Revised Statutes, Section 452, prohibiting employes of the General Land Office from "becoming interested in the purchase of any of the public lands." This court stated that its duty in said case was to consider "whether such a surveyor is within the prohibition" * * * "and, if so, whether that prohibition made the readjusted location void, or only voidable at the instance of the Government." This court cited approvingly Prosser v Finn and decided (a) that the prohibition included such a surveyor, (b) that an act done in disregard of the prohibition was within "the general rule of law" * * * "that an act done in violation of a statutory prohibition is void and confers no right upon the

wrong doer," and (c) therefore, "that the readjusted location was void."

Ewert v Bluejacket, supra, involved a purchase of Quapaw Indian land by a special assistant to the Attorney General of the United States assigned to duty in connection with allotments to the Quapaws. The question there was whether the deed such assistant received under his purchase was void. After discussing Revised Statutes, Section 2078, which provides that "no person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States," and citing Prosser v Finn and Waskey v Hammer, this court decided that "the purchase by Ewert being prohibited by the statute was void."

There is no principle of public land jurisprudence more familiar to the public than "the long and well established rule that the validity of an entry is to be determined by the facts existing at the date thereof." Franceway vs Griffiths (11 L. D., 315).

Equally deep rooted in that jurisprudence is the other principle, to wit, that "the qualifications requisite on the part of a homesteader must exist at the date of entry." Brown vs Cagle, (30 L. D., 8) and Case vs Kupperschmidt (30 Ib. 9).

III. The Petitioners Seem to Contend That There is Inharmony in the Decisions in Holt vs. Murphy (207 U. S., 407) and Prosser vs. Finn (208 U. S. 67).

Holt vs Murphy was decided January 6, 1908. Prosser vs Finn was decided January 13, 1908. The entry of which the court took notice in Holt vs Murphy was neither void on its fact nor void by reason of any facts of which the land department had judicial notice. The question there was not whether a void entry was effective to segregate land from the public domain and remove it from the reach of a valid application for entry. The question there was

whether a person who had contested and secured the cancellation of an entry which was valid when made had been wrongfully deprived of an opportunity to exercise the preference right of entry which was earned by reason of the successful contest. If in Holt vs Murphy the court had discussed any question involving a void entry, it is not unlikely that the opinion in Prosser vs Finn, which in fact discussed a void entry and which was announced only seven days after announcement of the opinion in Holt vs Murphy, would have contained some reference to the latter case.

The petitioners cite Dillard vs. Hurd (46 L. D., 51) and other cases in the land department and seem to contend that the rulings therein are inharmonious with the opinion of this court in Prosser vs. Finn, supra. However, only a casual examination of the departmental decisions cited by the petitioners will suffice to be convincing that they were made with respect to entries which were entirely regular upon their face and, for that reason, entirely unlike the entry which respondent made on March 3, 1902, and which was void on its face.

IV. The Petitioner Acquired No Right Whatever Under His "Contest" Against the Void Entry.

Very early in the proceedings under his contest against the void entry, the petitioner here became apprized of the facts which demonstrated that such entry was a nullity. The Supreme Court of Oklahoma remarked that "the facts surrounding this matter were well known to all the parties involved and were apparent of record, of which record the defendant Lowe was bound to take notice." (P. 33 of petition.) Notwithstanding the petitioner's knowledge of such facts, the prosecution of his contest against the void entry was continued. Moreover, early in the proceeding under the contest, the petitioner here became apprized of the fact that in July, 1906, the respondent not only applied for an entry of the land that was described in the void

entry but had entered into occupancy of it under the second homestead entry act of 1902.

A contestant is an informer. He seeks a reward for bringing to the notice of the land department matters of fact which are not shown by the records of that department. The reward sought is the preference right of entry conferred by the second section of the act of May 14, 1880, supra, a right which accrues only after cancellation of an entry as a consequence of proceedings under a contest.

The information which the petitioner imparted to the land department under his contest against the void entry was not essential to a judgment of "cancellation" of that entry. Such entry should have been "canceled" without being contested, and would have been "canceled" without being contested if the land department had performed its duty with respect to it. But that department chose to "cancel" the entry upon proof adduced by the contestant that respondent had not done what he was without any obligation whatever to do, namely, reside upon and cultivate land described in a void homestead entry, rather than upon the basis of those facts with respect to the void entry which showed it to be void ab initio and of which that Department had judicial notice over a period that antedated the bringing of the contest.

An "entry" which is null and void on its face cannot be made the subject of a contest, for it is not an entry. An entry which is void on its face is a nullity, and an order of "cancellation" cannot be operative on a nullity. Hence the respondent here acquired nothing whatever by way of a right with respect to the land in suit here by virtue of anything done under his contest proceeding.

V. Void Entries, Per Se, Are Not a Bar to the Reception of Due Applications for Entry of the Lands Described Therein.

An entry that is invalid on its face, i. e. an entry the invalidity of which is apparent from the papers consti-

tuting it, or is fatally defective by reason of matters of fact within the judicial notice of the land department, is void, is a nullity. That a void entry upon the records of the land department is not a legal or otherwise sufficient basis for rejection of an application to enter the land described in such void entry, is a proposition which the land department has invariably sustained. Three of its frequently cited decisions, none of which has ever been overruled or modified, will be adverted to briefly.

In David P. Litz (3 L. D., 182) it was evident from the record of the land department that a timber culture entry by one Curtis was erroneously and inadvertently allowed contrary to the provision of the timber culture entry statute "that not more than one-quarter of any section shall be thus granted." While such entry was still of record the land described therein was applied for by Litz. Acting on Litz's application the Interior Department said:

> "An entry which is illegal and void has no legal effect, and although it may be erroneously allowed to find place upon the record, is not a valid appropriation of the land and will not exclude it from further appropriation or at least from incipient appropriation. *It is nominally, only, an appropriation, and not so in fact.* As held in Wilcox v Jackson (13 Peters, 498) land must be *'legally appropriated'* in order to its severance from the mass of public lands."

In Shurtleff v. Kelly, et al (4 L. D. 448), Shurtleff applied to make homestead entry of land embraced in a timber culture entry which the records of the land department showed was void. In sustaining Shurtleff's application the Secretary said:

> "I am of the opinion that the ruling of your office, that Shurtleff could derive no benefit from his said application during the existence of the said entry of Kelly, was erroneous. Said entry being a second timber culture entry in a section was, for that reason,

prima facie void. If void, it was no segregation or appropriation of the land embraced in it."

In Jeremiah H. Murphy (4 L. D. 467), the land department records showed that Murphy was allowed to make an entry at a time (February 6, 1884) when the land was not subject to entry. When it became subject to entry (May 20, 1884) Murphy filed a second application for entry which was rejected for the stated reason that the entry he made on February 6, 1884, "was intact on the records." The Secretary said:

> * * * "the entry of Murphy, of February 6, being erroneously allowed, was as you decided illegal and void ab initio. A void act is an absolute nullity, and has no force or effect whatever. Therefore Murphy's entry of February 6 was not a bar to his application of May 20, and it was not necessary that his first entry should be finally cancelled to authorize his second application. This principle is fully announced in the case of David Litz, (3 L. D., 181). The decision of your office is therefore reversed, and Murphy's application will be allowed."

VI. The Assertion of the Petitioners That the Rejection of Respondent's Application, Filed in July 1906, "Does Not Entitle Him to Maintain a Bill in Equity to Declare the Petitioners Trustees for His Benefit."

The above assertion appears at page 12 of the petition. Its unsoundness is evident from Ard v. Brandon (156 U. S., 537); Duluth & Iron Range R. R. Co. v. Roy (173 U. S., 590); Nilson v. N. P. Ry. Co. (188 U. S., 108); Oregon, et cet. R. R. v. United States (189 U. S., 103); Knepa v. Sands (194 U. S., 476), and many other cases. Some of the observations in Ard v. Brandon, supra, are so apt here that we will briefly refer to that case.

Ard applied for a homestead entry. His application was rejected upon the stated ground that the land was not open

to such entry. Subsequently the legal title to the land passed from the United States and became vested in Brandon, et al, who sued Ard for possession. This court decided for Ard, saying that the rejection of his application was "wrongful, and denied to defendant that homestead entry which under the law he was then entitled to" * * * "He did all that was in his power in the first instance to secure the land as his homestead. That he failed was not his fault; it came through the wrongful action of one of the officers of the government" * * * "But here a rightful application was wrongfully rejected. This was not a matter of advice but of decision."

In Gilbert v. Shearing (4 L. D., 463) the Interior Department said:

> "It has been repeatedly held by the Department and by the Supreme Court of the United States, that when an applicant to enter public land has done all that the law requires of him, his rights will not be lost by the failure or neglect of the district land officers to do their duty. Lytle v. Arkansas. (9 How., 333)."

CONCLUSION

Wherefore, the respondent prays that the said petition for a writ of certiorari be denied, with costs.

ALEXANDER J. DICKSON,
Respondent,
By PATRICK H. LOUGHRAN,
Attorney for Respondent.

Supreme Court of the United States.

October Term, 1926.

SUSAN LOWE, *Petitioner*,
v.
ALEXANDER J. DICKSON, *Respondent*. } No. 158.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

MOTION FOR A RULE ON THE PETITIONER TO SHOW CAUSE WHY THERE SHOULD NOT BE FURNISHED ADDITIONAL SECURITY UNDER THE SUPERSEDEAS BONDS HEREIN.

Alexander J. Dickson, by his attorney, hereby moves for a rule of this Honorable Court to the petitioner herein to show cause—

1st. Why there should not be furnished additional security under the supersedeas bond that was given to stay execution of the judgment of the District Court of Beaver County, State of Oklahoma, rendered June 26, 1922, pending a review of such judgment by the Supreme Court of the said State, and

2d. Why the bond that was given to stay the mandate of the Supreme Court of the State of Oklahoma, under the judgment of that court rendered December 9, 1924, in affirmance, in all things, of the aforesaid judgment of the District Court of Beaver County, Oklahoma,

should not be adjudged insufficient to obtain a review in this court of the judgment of the said State Supreme Court,

And in support of the motion it is respectfully shown:

That on the 14th day of July, 1922, the Clerk of the District Court of Beaver County, Oklahoma, approved a bond in supersedeas of execution of the judgment of that court, pending a review of such judgment by the Supreme Court of Oklahoma. (A certified copy of such bond is annexed to the original of this motion, as exhibit No. 1 thereto, and a print thereof appears in the appendix hereto.) On such bond Seward K. Lowe, deceased, and Susan Lowe were the principals, and George Heglin, O. M. Kirkhart and George Merett (sometimes spelled Merritt), the sureties. That such bond was in the sum of $2,500, and operated to stay execution under a judgment "for the sum of Seven Hundred Dollars ($700) and costs and requiring said defendants to execute to said plaintiff a good and sufficient deed of conveyance" of the land in suit.

That since execution of the aforesaid bond the said George Heglin and O. M. Kirkhart have become and are wholly insolvent; that the said George Merett (or Merritt) is not now the owner of any property, of any kind or sort, of the value of the amount of said bond. (See the affidavit of Alexander J. Dickson, respondent, alleging "that George Heglin and O. M. Kirkhart have become wholly insolvent," annexed to the original of this motion, as exhibit No. 2 thereto, a print thereof appearing in the appendix hereto. See also the certified copy, annexed to the original of this motion, of the return, *nulla bona*, by the Sheriff of Beaver County, Oklahoma, made April 13, 1925, under the writ of execution that issued out of the District Court of said County to satisfy a judgment against George Heglin

obtained in the said court on May 21, 1924, in P. A. Johnston, et al v. C. C. Cope, et al, No. 3227 on the docket of said court.)

That the said O. M. Kirkhart justified as a surety by representing that he was the owner of 160 acres of land in Harper County, Oklahoma, valued at $9,000. That, however, the said Kirkhart sold and conveyed such land on July 2, 1926; that said Kirkhart is not now the owner of any real property in said county and is not now assessed for either realty or personalty in said county. (See the aforesaid affidavit of the respondent. See also the certificates by the County Clerk and County Assessor of Harper County, Oklahoma, annexed to the original of this motion, as exhibits Nos. 3 and 4 thereto, a print of such certificates appearing in the appendix hereto.)

That the said Kirkhart is not an owner of any real property in the County of Beaver, State of Oklahoma; that his taxable property in said County on January 1, 1926, was personal property only, of an assessed value of $110. (See the certificate of the Deputy County Assessor of Beaver County, annexed to the original of this motion.)

That the said George Merett (or Merritt) justified as a surety by representing that he was the owner of 160 acres of land in Beaver County, Oklahoma, of the aggregate value of $6,000, subject to a mortgage for $1,500, and of a business house and lot in the town of Gate, Oklahoma, valued at $2,000; that, however, the present fair value of such realty does not exceed $3,800, and such value, less the amount of such mortgage, is less than the amount of the liability of said Merett (or Merritt) on the bond aforesaid. (See the aforesaid affidavit of the respondent.) That the said Merett (or Merritt) was married and the head of a family at

time of execution of the said bond. That, however, his wife did not join in the execution thereof and, therefore, the aforesaid 160 acres are subject to a claim to it as a homestead, which claim may be lawfully asserted at any time.

That after affirmance by the Supreme Court of Oklahoma, in all things, of the judgment of the District Court of Beaver County, the said Supreme Court passed an order (a certified copy thereof being annexed to the original of this motion, as exhibit No. 5 thereto, a print thereof appearing in the appendix hereto) "that plaintiff in error be required to give supersedeas bond in the sum of $2,000, pending appeal to the Supreme Court of the United States." That pursuant to the authority of such order, the Clerk of the District Court of Beaver County, Oklahoma, approved a supersedeas bond (a certified copy thereof being annexed to the original of this motion, as exhibit No. 6 thereto, a print thereof appearing in the appendix hereto), on which bond Seward K. Lowe and Susan Lowe are the principals and E. D. Morris and T. H. Kirkpatrick are the sureties. That such bond is in the sum of $2,000, and was "conditioned that Seward K. Lowe and Susan Lowe will, during the time that the defendant in error is kept out of the possession of said property by virtue of the order of the Supreme Court of Oklahoma, denying the mandate, pay the value of the use and occupation of the property from the date of this undertaking until the delivery of possession and all costs," etc.

That the bond last mentioned, as its express terms denote, does not afford any security whatever to the respondent for any liability of the petitioners to the respondent that accrued at any time previous to June 23, 1925, on which date the State Supreme Court stayed its mandate upon condition that a supersedeas bond be

furnished. That, therefore, and because the sureties on the bond first mentioned herein, viz., the bond that stayed execution under the judgment rendered by the District Court of Beaver County, are insolvent, respondent is without that security for recovery pursuant to the judgment of the District Court of Beaver County to which he is entitled, and which the petitioner is required by law to furnish as a condition precedent to further prosecution of the writ of certiorari in this Honorable Court.

Wherefore, the respondent prays that this Honorable Court (a) will issue its rule upon the petitioner as moved for herein, and (b) that it will enter an order to its Clerk not to calendar this cause for argument or hearing, if at all, until after judgment rendered under the return to such rule.

Respectfully submitted:

ALEXANDER J. DICKSON.
By PATRICK H. LOUGHRAN,
Attorney for Alexander J. Dickson.

To Samuel Herrick, Esq.,
Attorney for the petitioners,
Washington, D. C.

You are notified hereby that on Monday, the 13th day of December, 1926, the foregoing motion will be presented to the Court.

PATRICK H. LOUGHRAN,
Attorney for Respondent.

Service of copy hereof, and of copies of all accompanying papers, is acknowledged this 26th day of November, 1926, at Washington, D. C.

SAMUEL HERRICK,
Attorney for Petitioner.

APPENDIX.

Exhibit No. 1.

IN THE DISTRICT COURT OF BEAVER COUNTY, STATE OF OKLAHOMA.

Alexander J. Dickson, *Plaintiff*,
vs.
Seward K. Lowe and Susan Lowe, *Defendants.* } No. 1991.

Supersedeas Bond.

Know All Men by These Presents:

That Seward K. Lowe and Susan Lowe, obligors and George Heglin, O. M. Kirkhart and George Merett, as sureties are held and firmly bound unto Alexander J. Dickson, plaintiff in the above entitled cause in the sum of Twenty Five Hundred Dollars ($2500.00) for the payment of which well and truly to be made we and each of us do hereby jointly and severally bind ourselves, our successors and assigns.

Dated this 14 day of July, 1922.

The conditions of the above and foregoing obligation is such that whereas in said court on the 26th day of June, 1922, judgment was rendered in favor of said obligee, plaintiff in said cause and against these obligors, Seward K. Lowe and Susan Lowe, defendants in said cause, for the sum of Seven Hundred Dollars ($700.00) and costs and requiring said defendants to execute to said plaintiff a good and sufficient deed of conveyance as in said judgment provided.

And whereas said defendants have taken an appeal from said judgment to the Supreme Court of the State of Oklahoma.

Now therefore if the said principal obligors herein

shall pay to the said obligee the condemnation money and costs and otherwise comply with the judgment of said court in case the judgment of said court shall be adjudged against them or affirmed in whole or in part then this obligation shall be void; otherwise to remain in full force and effect.

SEWARD K. LOW
SUSAN LOW
Principals,
GEORGE HEGLIN
O. M. KIRKHART
GEORGE MERETT
Sureties.

I hereby approve the above Bond, this 14th day of July, 1922.

JESSIE KEITH STEWART,
Court Clerk.
By JESSIE MAY FICKEL, *Deputy.*

Endorsed on back:

#1991
Alexander J. Dickson Plaintiff vs. *Seward K. Low and Susan Low Defendants.*

SUPERSEDEAS BOND

Filed this 14 day of July 1922 Jessie Keith Stewart, Court Clerk.
By Jessie Mae Fickel, *Deputy.*

O. C. Wybrat and C. W. Herod Attys. for Defendants Woodward, Oklahoma.

Recorded at Book 4 Page 573–4–5

CERTIFICATE.

STATE OF OKLAHOMA, } ss.
County of Beaver, }

I, Anna Hughes, the duly elected, qualified and acting Court Clerk, within and for said County and State, do

hereby certify that the within and foregoing is a full, true and complete copy of the Supersedeas Bond and Justification of Sureties as the same remains on file and of record in my office at Beaver, Oklahoma.

In witness whereof I have hereunto set my hand and seal, this 15th day of November, 1926.

ANNA HUGHES,
Court Clerk.

(SEAL) By *Deputy.*

EXHIBIT No. 2.

IN THE SUPREME COURT OF THE UNITED STATES

No. 158, October Term, 1926.

SEWARD K. LOWE AND SUSAN LOWE, *Petitioners,*
vs.
ALEXANDER J. DICKSON, *Respondent.* } No.

AFFIDAVIT OF RESPONDENT ON MOTION FOR ADDITIONAL BOND.

STATE OF OKLAHOMA, } *ss:*
County of Beaver, }

Alexander J. Dickson, of lawful age, being first duly sworn upon his oath, states that he is the Respondent in the above entitled cause. That the above entitled cause was tried in the District Court of Beaver County, Oklahoma, on the 26th day of June, 1922, and judgment rendered in favor of the Respondent and against Seward K. Lowe and Susan Lowe, Petitioners.

That on the 14th day of July, 1922, Petitioners filed their Supersedeas Bond with the Court Clerk of Beaver County, Oklahoma in the penal sum of $2,500.00, signed by Seward K. Lowe and Susan Lowe as principals, and George Heglin, O. M. Kirkhart and George Merritt as sureties.

That the said Supersedeas Bond was duly approved by the Court Clerk of Beaver County, Oklahoma, and execution stayed on said judgment while said cause was pending in the Supreme Court of the State of Oklahoma.

Affiant further states that since the approval of said bond that George Heglin and O. M. Kirkhart have become wholly insolvent.

Affiant further states that in a cause pending in the District Court of Beaver County, Oklahoma, wherein

P. A. Johnson, Roy Sappington, J. L. Vance, A. J. Dickson and F. R. Shauner are Plaintiffs and Clifton C. Cope, George Zirkle, George Heglin, H. O. Hennicke and H. S. Mathers were Defendants.

That judgment was rendered against said Defendants, including said George Heglin, in the sum of $3,898.17, and that afterwards execution was duly issued to the Sheriff of Beaver County on said judgment, and that said execution was duly returned "No Property Found."

Affiant further states that he was present in the court room and heard the sworn testimony of George Heglin in a proceeding to discover assets upon which execution could be levied, and that the said George Heglin testified under oath, that he was wholly insolvent and that he had no property subject to execution.

That the shorthand reporter who took down said testimony resided at Alva, Oklahoma, at that time, and this affiant is informed that this said shorthand reporter has removed from Alva, and that he does not know the present address of said reporter, and that he could not procure a copy of the testimony of the said George Heglin in said proceeding.

Affiant further states that O. M. Kirkhart, another surety on the said supersedeas bond, listed One Hundred and Sixty Acres of land in Section 34, Township 28, Range 26, W. I. M. Harper County, Oklahoma, and valued the same at $9,000.00, with an indebtedness against the same for $2,000.00.

Affiant states that he is acquainted with said land and that the same is not worth at the present time to exceed $3,000.00 and that he is informed by the County Clerk of Harper County, Oklahoma, that the said land is mortgaged for the sum of $6,600.00, much more than the said property would sell for under execution.

That the other surety on the said supersedeas bond, George Merritt, lists as his sole property upon said bond, One Hundred Sixty Acres of Land in Section 28, Township 5, Range 28, E. C. M. Beaver County, Oklahoma, valued at $6,000.00 and a business house and lot in Gate, Oklahoma, valued at $2,000.00, with a mort-

gage on the One Hundred Sixty Acres of land above referred to of $1,500.00.

Affiant further states that he is well acquainted with the value of land in that neighborhood, having lived about three and one half miles from said land for a number of years and that the value of said land is not to exceed $3,000.00, and that the value of the town property in Gate, Oklahoma, listed for $2,000.00 is not to exceed $800.00. That the property owned and listed by the said George Merritt, with the indebtedness deducted from the same is not to exceed $2,300.00.

Affiant further states that at the time that said supersedeas bond was approved real estate values in Oklahoma had been inflated to double their former value, and double their present value, and that not one half of the land in western Oklahoma would sell under execution for as much as it is mortgaged for.

Affiant further states that no other supersedeas bond was filed to stay an execution of the judgment of the District Court of Beaver County, Oklahoma, pending the decision of the Supreme Court of the State of Oklahoma, except the bond above referred to.

ALEXANDER J. DICKSON,
Affiant.

Subscribed and sworn to before me this 17th day of November, 1926.

H. N. LAWSON,
Notary Public.

(SEAL)

My Commission expires September 4th, 1928.

EXHIBIT No. 3.

STATE OF OKLAHOMA, *County of Harper,* } ss:

AFFIDAVIT

Virgil C. Dicksinson, being first duly sworn on oath says: That he is the duly elected, qualified and acting County Clerk of Harper County, State of Oklahoma, and as such County Clerk has the custody of the records in the office of the County Clerk of said County.

Affiant further states that the records do not show any land or real property in the name of O. M. Kirkhart.

Affiant further states that the records of this office show that the said O. M. Kirkhart was the owner of the NE¼ of Sec. 34, Twp 28 N. R. 26 W. I. M. and that on the 2 day of July, 1926 the said O. M. Kirkhart conveyed said described land to A. L. Kirkhart and now the said A. L. Kirkhart is the record owner of said described land, and that the incumbrance and indebtedness against said described land amount to the sum of $6600.00.

VIRGIL C. DICKINSON,
County Clerk of Harper County, Oklahoma.

Subscribed and sworn to before me this 19 day of November 1926.

B. F. WILLETT,
Notary Public.

(SEAL)

My commission expires January 30, 1929.

EXHIBIT No. 4

STATE OF OKLAHOMA, } ss:
Harper County, }

AFFIDAVIT

I, Tom Ricker, being first duly sworn on oath, say: That I am the duly elected, qualified and acting County Assessor of Harper County, Oklahoma, and have the custody and control of the records containing the assessment of the real and personal property, subject to assessment and taxation located and situated in Harper County, Oklahoma.

That the records in my office do not show any property, either personal or real assessed against O. M. Kirkhart or listed by him for taxation.

TOM RICKER,
County Assessor of Harper County, Oklahoma.

Subscribed and sworn to before me this 19 day of November, 1926.

B. F. WILLETT,
Notary Public.

(SEAL)

My commission expires January 30, 1929.

EXHIBIT NO. 5

Filed in the Supreme Court of Oklahoma, June 23, 1925.

WILLIAM M. FRANKLIN,
Clerk.

SUPREME COURT, JUNE TERM, 1925, JUNE 23D, 1925

14001 *S. K. Lowe, et al.* vs. *A. J. Dickson.*

And now on this day it is ordered by the court that plaintiff in error be required to give supersedeas bond in the sum of $2,000.00, pending appeal to Supreme Court of the United States. Said bond to be given within 10 days and to be approved by the Court Clerk of Beaver County.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the order of said Court in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court of Oklahoma City, this 13th day November, 1926.

WILLIAM M. FRANKLIN,
Clerk.

(SEAL)

By ALAN ALEXANDER,
Deputy.

EXHIBIT 6.

Filed in Supreme Court of Oklahoma, June 29, 1925.
WILLIAM M. FRANKLIN,
Clerk.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SEWARD K. LOW AND SUSAN LOW,
Plaintiffs in Error,
vs.
ALEXANDER J. DICKSON,
Defendant in Error.
No. 14,001.

BOND.

That whereas, The Supreme Court of the State of Oklahoma made an order holding the mandate in the above cause preparatory to taking the case to the Supreme Court of the United States, the cause having been affirmed by the Supreme Court of Oklahoma.

It appearing therefore that Seward K. Lowe and Susan are in possession of the property and that an application has been made by the defendant in error in the Supreme Court, requesting that the plaintiffs in error be required to execute a bond in the sum of Two Thousand ($2,000.00) Dollars as conditioned by law, for the protection of the rents and profits on the property pending the proceedings and during such time as the order of the Supreme Court will stay the mandate and prevent the execution of the judgment.

We, therefore, Seward K. Lowe and Susan Lowe, as principals, and E. D. Morris and T. H. Kirkpatrick, _____, _____, and _____ as sureties, acknowledge ourselves firmly bound unto Alexander J. Dickson in the penal sum of Two Thousand Dollars, conditioned that Seward K. Lowe and Susan Lowe will, during the time that the defendant in error is kept out of the possession of said property by virtue of the order of the Supreme Court of Oklahoma, staying the mandate, pay

the value of the use and occupation of the property from the date of this undertaking until the delivery of possession and all costs and will not commit waste or suffer to be committed any waste thereon. Provided, the judgment of the Supreme Court of Oklahoma is affirmed by the Supreme Court of the United States. That in case the said judgment is reversed by the Supreme Court of the United States, this bond shall be void.

Executed this the 27th day of June, 1925.

SEWARD K. LOW,
SUSAN LOW,
Principals.
E. D. MORRIS,
T. H. KIRKPATRICK,
Sureties.

APPROVAL OF THE BOND

The undersigned Clerk of the District Court of Beaver County, Oklahoma, hereby approves the foregoing bond.

ANNA HUGHES,
Clerk of the Court.

[SEAL]

Filed in the Supreme Court of Oklahoma, June 29, 1925.

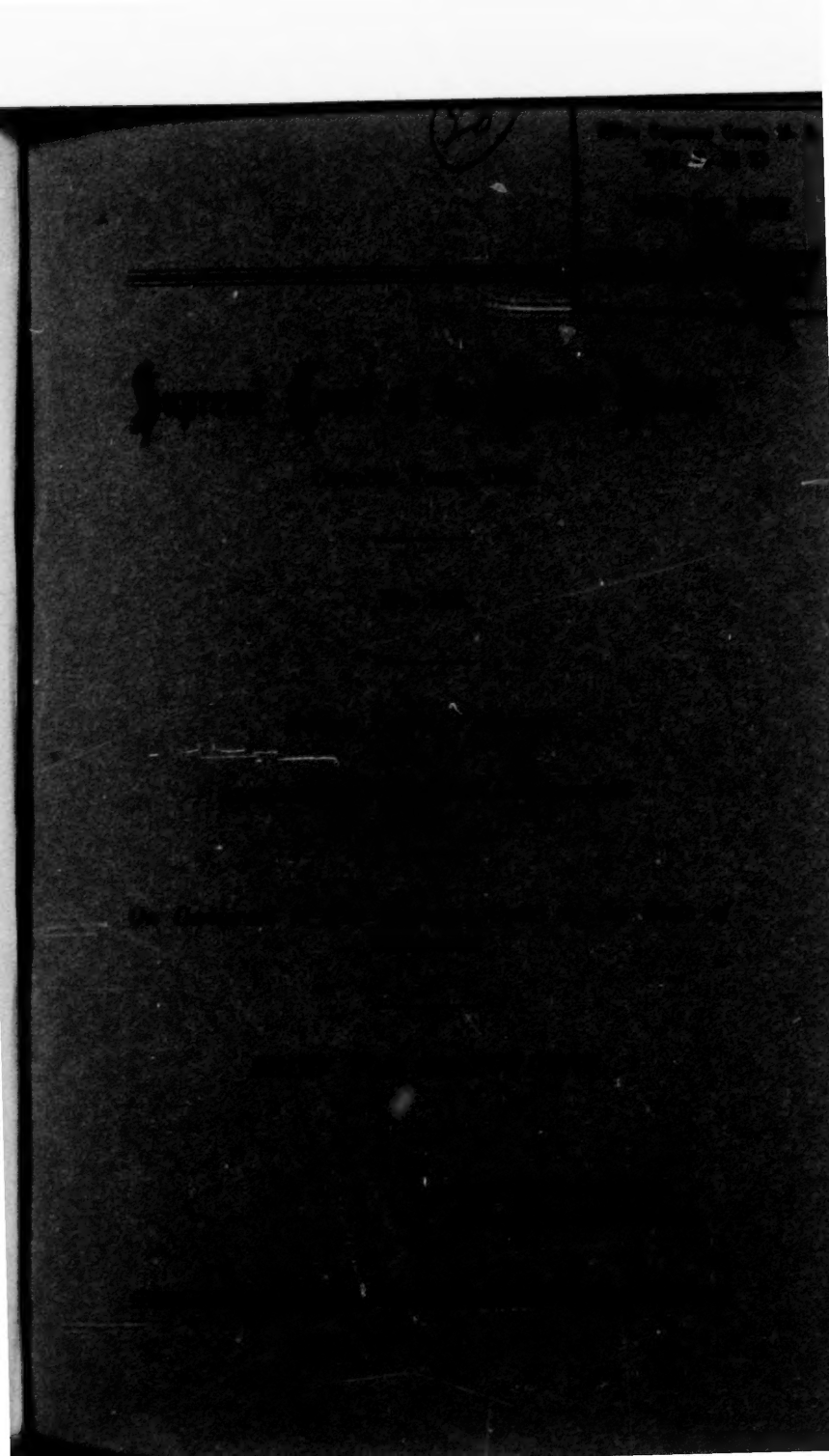
WILLIAM M. FRANKLIN,
Clerk.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the bond except the certificate of the sureties as to their debts and liabilities attached to the bond, as the same remains on file in my office.

In Witness Whereof, I hereunto set my hand and affix the Seal of said Court at Oklahoma City, this 13th day of November, 1926.

WILLIAM M. FRANKLIN,
Clerk.
By ALAN ALEXANDER,
Deputy.

[SEAL]



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Supreme Court of the United States.

October Term, 1926.

No. 158.

SUSAN LOWE, *Petitioner*,

v.

ALEXANDER J. DICKSON, *Respondent.*

On Certiorari to The Supreme Court of the State of Oklahoma.

BRIEF FOR RESPONDENT.

I.

WHAT PETITIONER SAYS SHE RELIES UPON IN THIS COURT.

At page 17 of the petitioner's brief it is stated that there is only one assignment of error "in this case," viz, that both courts below "erred in holding that the petition stated a cause of action." That statement hardly constitutes a specification of error. However, in support of it the petitioner sets forth what are described in the brief as three major propositions of law, viz,

1st. That the Interior Department "was right" in deciding that the act of May 22, 1902, c. 821, 32 Stat. 203, validated the homestead entry which was inadvertently permitted to be made by the respondent, on March 3, 1902 (petitioner's brief, p. 18).

2d. That the Interior Department "rightfully refused" to receive and allow the homestead application that was tendered by the respondent on July 2, 1906. (Petitioner's brief, p. 27.)

3d. That no rights "can be acquired" under an application to make a homestead entry, "where such application is rejected by the proper land office." (Petitioner's brief, p. 32.)

But it is in the "Conclusion" of petitioner's brief (p. 41 thereof) that there will be found the *only* proposition upon which she actually relies for reversal of the concurring judgments of the two courts below. The "Conclusion" is stated thus:

> "It will be observed from the pleading in this case that the only act ever done or performed by the respondent, Alexander J. Dickson, was to make and tender to the land office an application, which was rejected. It is true that he seeks to make proof of his occupation and cultivation in the court where he filed this suit. He also filed an affidavit as required. He didn't, however, make any act (sic) to comply with the Act of March 3, 1879, by publishing notice of his intention to prove up.
>
> "It seems to us that we can not be wrong in our contention that the mere tendering an application, which was rejected, could be made the basis of a suit in equity to establish title to public lands of the United States."

The extent to which, if at all, the petitioner urged upon either of the lower courts the contentions set out in the "Conclusion" is not evident from the contents of the record. However, there is an observation in the opinion of the State Supreme Court (R. 54) that may fairly be regarded as a notice by that court

of such, or a similar contention. The observation is this:

> "The adjudication of the questions involved is not a substitution of the court for the land office, but involves the question whether or not the Department erred in a pure matter of law."

Such brief notice of the unsound contention set out in the "Conclusion" of petitioner's brief, seems to be the only respect in which the State Supreme Court's opinion was not detailed and exhaus ··e in discussion of every contention on behalf of the petitioner which was, or which could be, made with any color of relevancy under the issues in the proceeding.

And that such notice was brief was doubtless due to the emphasis the petitioner placed on other and very different propositions in the courts below, and which are practically abandoned here. In those courts, as is manifest from the State Supreme Court's opinion, the petitioner relied exclusively upon this proposition, to wit, that the act of May 22, 1902, *supra*, was retroactive and validating legislation, i. e., that it rendered valid thereafter what was void theretofore, to wit, the homestead entry in the name of the respondent which the Register of the local land office, after inadvertently recording on March 3, 1902, discovered, on March 6, 1902, if not theretofore, had been erroneously allowed. (R. 11.)

That the aforesaid statute was not retroactive and was without validating effect, was the well reasoned conclusion of the Supreme Court of Oklahoma. After saying that such conclusion by the said court was erroneous, the petitioner (pp. 10 and 11 of petitioner's brief) added:

> "Still, even if we are in error, the following propositions are conclusive in favor of the petitioner."

And then follow propositions substantially those set forth in the "Conclusion" of the petitioner's brief. And that brief, we submit, as well as the character of the errors assigned, cause the petitioner's case in this Court to rest upon the following propositions stated in the "Conclusion" of her brief, to wit:

> "It seems to us that we can not be wrong in our contention that the mere tendering an application which was rejected, could be made the basis of a suit in equity to establish title to public lands of the United States."

II.

AN ERRONEOUS DENIAL OF AN APPLICATION TO ENTER PUBLIC LAND IS SUFFICIENT GROUND FOR A SUIT TO ADJUDGE THE HOLDER OF THE TITLE UNDER THE PATENT A TRUSTEE.

It had been decided by the Land Department that the respondent had no claim whatever to the land under the application which he filed on July 2, 1906. Therefore, if the respondent had attempted to make proof of residence upon and cultivation of the land before the Land Department he would have been told by the Department that he was without any claim to the land which he could prosecute and maintain by such proof. Because the respondent had not done something which he could not have done, to wit, submit proof to the Land Department of residence and cultivation of the land to the extent required by the

homestead laws, the petitioner asserts that the respondent has no standing in this or any other court. Some of the many decisions that demonstrate the unsoundness of that assertion are those to which we now refer, to wit:

In *Duluth and Iron Range Railroad Co.* v. *Roy*, 173 U. S. 587, 590, the same contention was made as is made here, viz, "that he [the homestead claimant whose application for entry was erroneously denied by the Land Department] has not made or has not offered to make final proof" before that Department of compliance with the residence and cultivation requirements of the homestead laws. This Court answered the contention thus:

> "This contention is attempted to be supported by the principles announced in *Bohall* v. *Dilla*, 114 U. S. 47; *Sparks* v. *Pierce*, 115 U. S. 408; *Lee* v. *Johnson*, 116 U. S. 48. The principles are that to enable one to attack a patent from the Government he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.
>
> "We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness; may not have reached it, and yet justify relief, as in *Ard* v. *Brandon*, 156 U. S. 537, and in *Morrison* v. *Stalnaker*, 104 U. S. 213. And because of the well-established principle that where an individual in the prosecution of a right has done

that which the law requires him to do, and he has failed to attain his right by the misconduct or neglect of a public officer, the law will protect him. *Lytle* v. *Arkansas*, 9 How. 314.

"It would be arbitrary to apply the principle to some acts and not to other—might destroy it utterly to require the performance of all. But we are indisposed to extend the argument, because we regard *Ard* v. *Brandon* as decisive.

"In that case the claimant against the patent, being qualified and entitled, offered to make final proof, and from the denial of the offer prosecuted appeals successively to the Commissioner of the General Land Office and the Secretary of the Interior, and each decided against him. In this case defendant in error, also being qualified and entitled, offered to enter the land, which offer was denied, and against the claim of the State of Minnesota he instituted a contest, which was pending in the General Land Office, when the patent was issued by inadvertence and mistake, and his right thereby defeated. We do not regard this difference in the cases substantial."

In *Ard* v. *Brandon*, 156 U. S. 537, 544, an application to make homestead entry was erroneously rejected. The rejection, of course, precluded the possibility (as the rejection in this case precluded the possibility) of submitting final proof before the Land Department of compliance with the homestead laws. This Court said:

"But here a rightful application was wrongfully rejected. This was not a matter of advice but of decision. Doubtless the error could have been corrected by an appeal, and perhaps that would have been the better way; but when, instead of pursuing that remedy, he is persuaded by the local land officer that he can accomplish that which he desires in another way—a way that to him

> seems simpler and easier—it would be putting too much of rigor and technicality into a remedial and beneficial statute like the homestead law to hold that the equitable rights which he had acquired by his application were absolutely lost."

In *Svor* v. *Morris*, 227 U. S. 524, a settlement was made at a time (in 1888) when a defective indemnity selection of the land by a railway company was pending. The selection was finally rejected on October 23, 1891, and six days thereafter the company filed another indemnity selection of the same tract, which selection was approved on March 29, 1897, the approval and resultant certification operating to pass title to the company. Thereafter the settler sued to have the company's grantee decreed to be a trustee of the title. This Court concluded that such suit was meritorious and should be sustained, notwithstanding that the settler had never proved in a proceeding before the Land Department that he had resided upon and cultivated the land as required by the homestead laws.

Nelson v. *Northern Pacific Railway*, 188 U. S. 108, 124, was another instance of an erroneous rejection of an application to make homestead entry, this Court saying:

> * * * "he (the homestead applicant) attempted to enter it under the homestead law in the proper land office, but his claim was overruled upon the theory, unfounded in law, that the land was covered by the railroad grant."

See also *Weeks* v. *Bridgman*, 159 U. S. 541, 546, and *Northern Pacific Railway* v. *Trodick*, 221 Ibid. 208.

In *Gilbert* v. *Spearing* (4 L. D., 463) the Interior Department said:

"It has been repeatedly held by the Department and by the Supreme Court of the United States, that when an applicant to enter public land has done all that the law requires of him, his rights will not be lost by the failure or neglect of the district land officers to do their duty. *Lytle* v. *Arkansas* (9 How., 333)."

III.

THE ACT OF MAY 22, 1902, WAS NOT RETROACTIVE AND VALIDATING LEGISLATION.

Throughout the petitioner's brief are *suggestions* to this Court that its duty is to adjudge the act of May 22, 1902, to be confirmatory and validating legislation. But at no place in that brief are the provisions of the statute discussed. And that fact is doubtless due to the other fact, viz, that none of the terms of the statute can furnish even color of ground on which to rest a conclusion that the act was confirmatory and validating. Neither in its express terms nor by any of its implications is the statute curative legislation. Only by judicial additions to the language of the statute—only through judicial legislation—is it possible to make the statute operative and effective as confirmatory and validating legislation.

Section 2 of the act of May 22, 1902, c. 821, 32 Stat. 203, is the legislation material here. Its provisions are these:

"Sec. 2. That any person who, prior to the passage of an Act entitled 'An Act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose,' approved May seventeenth, nineteen hundred, having made a home-

stead entry and perfected the same and acquired title to the land by final entry by having paid the price provided in the law opening the land to settlement, and who would have been entitled to the provisions of the Act before cited had final entry not been made prior to the passage of said Act, may make another homestead entry of not exceeding one hundred and sixty acres of any of the public lands in any State or Territory subject to homestead entry: Provided, That any person desiring to make another entry under this Act will be required to make affidavit, to be transmitted with the other filing papers now required by law, giving the description of the tract formerly entered, date and number of entry, and name of the land office where made, or other sufficient data to admit of readily identifying it on the official records: And provided further, That said person has all the other proper qualifications of a homestead entryman: And provided also, That commutation under section twenty-three hundred and one of the Revised Statutes, or any amendment thereto, or any similar statute, shall not be permitted of an entry made under this Act, excepting where the final proof, submitted on the former entry hereinbefore described, shows a residence upon the land covered thereby for the full period of five years, or such term of residence thereon as added to any properly credited military or naval service shall equal such period of five years."

That there is nothing in the above language to sustain a contention that the statute validated homestead entries made previous to its date, is so plain that argument in support of it need not be made in this court. All that devolves upon us is to refer to the principles of statutory construction upon which we rest our positive assertion that there is not discoverable at any

place in the aforesaid legislation anything whatever to warrant the view that its necessary effect was to confirm, ratify, and validate the homestead entry which was inadvertently and erroneously made in the name of the respondent on the 3d of March, 1902.

It is axiomatic that no statute will be construed as retrospective except as to the extent that the statutory language shows the intention "in unequivocal terms." This court has said:

> "Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms." Twenty Per Cent Cases, 20 Wall. 179, 187, and cases cited in the foot-note.

And does not the foregoing state "the settled doctrine of this court"? This Court has said:

> "In *United States* v. *Heth*, 3 Cranch, 398, 413, this court said, that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied;' and such is the settled doctrine of this court. *Murray* v. *Gibson*, 15 How. 421, 423; *McEwen* v. *Den*, 24 How. 242, 244; *Harvey* v. *Tyler*, 2 Wall. 328, 347; *Sohn* v. *Waterson*, 17 Wall. 596, 599; Twenty Per Cent Cases, 20 Wall. 179, 187." *Chew Heong* v. *United States*, 112 U. S. 536, 559.

For a court to declare a statute retroactive, those terms of it showing its retroactivity must be "clear, strong and imperative." This Court has said:

"The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent. 455; *Eidman* v. *Martinez*, 184 U. S. 578; *White* v. *United States*, 191 U. S. 545; *Gould* v. *Gould*, 245 U. S. 151; Story, Const., Sec. 1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'

* * * * * * *

"There is certainly in it no declaration of retroactivity, 'clear, strong and imperative,' which is the condition expressed in *United States* v. *Heth*, 3 Cranch, 398, 413; also *United States* v. *Burr*, 159 U. S. 78, 82–83." *Shwab* v. *Doyle*, 258 U. S. 529, 534, 535.

And on the basis of the authorities just cited, we submit that to construe the provisions of the act of May 22, 1902, as having retrospective effect would be to violate the fundamental precepts of statutory construction pronounced and constantly adhered to by this Court in a long line of decisions.

IV.

AS THE VOID ENTRY WAS NOT VALIDATED BY THE ACT OF 1902, THE LAND IN SUIT WAS SUBJECT TO THE APPLICATION FILED BY THE RESPONDENT IN JULY, 1906 AND TO THE SETTLEMENT HE MADE THEREON IN THAT MONTH.

Petitioner's husband prevailed in the Land Department because that Department "held that Dickson's entry was validated by the act of May 22, 1902"

(R. 40 and 41). *In so holding, the Department of the Interior admitted that such entry was invalid and void before May 22, 1902. That the Departmental decision was wrong—was without reason in any law—is, we think, beyond possibility of judicial doubt.*

And that being the respondent's position here—it being his contention that the entry was void and that it never was validated—there remain for discussion on his behalf but two other matters, viz, (a) the law with reference to which any question as to the validity of an entry should be determined, and (b) whether a void entry upon the records of the Land Department constitutes a legal or otherwise sufficient basis either for the rejection of an application to enter the land described in the void entry, or for a holding that a valid settlement may not be initiated and maintained upon the land during the time it is embraced in the void entry. For it is a fact of which sight should not be lost, that respondent not only applied for entry of the land in July, 1906, but also went into occupancy of it at that time and remained in occupancy of it continually for eleven years thereafter.

The Supreme Court of the State held, on the authority of *Prosser* v. *Finn*, 208 U. S. 67, that the respondent's entry was void. In that case this court had before it an entry of public land by an employee of the General Land Office. The question was whether the entry became valid by force of the employee's retirement from the service of the General Land Office. Answering that question in the negative, this Court said that the matter of the validity of the entry must be determined with reference to the facts and the applicable law obtaining when the entry was made; and if void then, it was void thereafter. That case, how-

ever, did not involve a question as to whether any subsequent enactment of Congress had a confirmatory or validating effect. But it did cause this court to conclude that if not validated by such legislation, an entry void when made is void ever after.

Respondent's inadvertently allowed entry was quite as emphatically forbidden by law as was the entry in *Prosser* v. *Finn, supra.* In both cases the entries were made by persons disqualified by the law to make the entries involved in the cases. *Waskey* v. *Hammer*, 223 U. S. 85, and *Ewert* v. *Bluejacket*, 259 U. S. 129, also involved public land filings forbidden by law. *Waskey* v. *Hammer* presented the question whether a mining location was void because made by a United States Deputy Mineral Surveyor in contravention of the provisions of the Revised Statutes, Section 452, prohibiting employees of the General Land Office from "becoming interested in the purchase of any of the public lands." This court stated that its duty in said case was to consider "whether such a surveyor is within the prohibition" * * * "and, if so, whether that prohibition made the readjusted location void, or only voidable at the instance of the Government." This court cited, approvingly, *Prosser* v. *Finn, supra*, and decided (a) that the prohibition included such a surveyor, (b) that an act done in disregard of the prohibition was within "the general rule of law" * * * "that *an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer*," *and* (c) *therefore*, "*that the readjusted location was void.*" (Emphasis ours.)

Ewert v. *Bluejacket, supra*, involved a purchase of Quapaw Indian land by a special assistant to the Attorney General of the United States assigned to duty in connection with allotments to the Quapaws.

The question there was whether the deed such assistant received under his purchase was void. After discussing Revised Statutes, Section 2078, which provides that "no person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States," and citing *Prosser* v. *Finn*, and *Waskey* v. *Hammer*, this court decided that "*the purchase by Ewert being prohibited by the statute was void.*" (Emphasis ours.)

There is no principle of public land jurisprudence more familiar to the public than "the long and well-established rule that the validity of an entry is to be determined by the facts existing at the date thereof." *Franceway* v. *Griffiths* (11 L. D., 314, 315.)

Equally deep rooted in that jurisprudence is the other principle, to wit, that "the qualifications requisite on the part of a homesteader must exist at the date of entry." *Brown* v. *Cagle* (30 L. D., 8), and *Case* v. *Kupferschmidt* (30 Ib. 9).

Holt v. *Murphy*, 207 U. S. 407, was decided January 6, 1908. *Prosser* v. *Finn*, 208 U. S. 67, was decided January 13, 1908. The entry of which the court took notice in *Holt* v. *Murphy* was neither void on its face nor void by reason of any facts of which the land department had judicial notice. The question there was not whether a void entry was effective to segregate land from the public domain and remove it from the reach of a valid application for entry. The question there was whether a person who had contested and secured the cancellation of an entry which was valid when made, had been wrongfully deprived of an opportunity to exercise the preference right of entry which was earned by reason of the successful contest. If in *Holt* v. *Murphy* the court had discussed any question involving a void entry, it is not unlikely that the opinion in

Prosser v. *Finn*, which in fact discussed a void entry and which was announced only seven days after announcement of the opinion in *Holt* v. *Murphy*, would have contained some reference to the latter case.

The petitioner cites *Dillard* v. *Hurd* (46 L. D., 51) and other cases in the Land Department, and seems to contend that the rulings therein are inharmonious with the opinion of the Supreme Court of Oklahoma. However, only a casual examination of the departmental decisions cited by the petitioners will suffice to be convincing that they were made with respect to entries which were entirely regular upon their face and, for that reason, entirely unlike the entry which respondent made on March 3, 1902, *and which was void on its face.*

There being no doubt, we think, that the inadvertently allowed entry of the respondent was void when made and never was confirmed or validated by any legislation, we pass to the next question, viz: Did the Land Department err not only in rejecting the respondent's application for entry filed in July, 1906, but in ignoring and disregarding the settlement he made on the land in that month and maintained thereafter? His settlement could not, of course, be proved before the Department, as it had denied his application for entry. That it wrongfully denied him an entry, and assigned an untenable ground for its denial, to wit, that the void entry segregated the land, is evident from many of the Department's decisions. Three of them frequently cited and never overruled or modified, will be adverted to.

In David P. Litz (3 L. D., 181, 182) it was evident from the records of the land department that a timber culture entry by one Curtis was erroneously and inadvertently allowed, contrary to the provision of the

timber culture entry statute "that not more than one-quarter of any section shall be thus granted." While such entry was still of record the land described therein was applied for by Litz. Acting on Litz's application the Interior Department said:

> "An entry which is illegal and void has no legal effect, and although it may be erroneously allowed to find place upon the record, is not a valid appropriation of the land and will not exclude it from further appropriation or at least from incipient appropriation. It is nominally, only, an appropriation, and not so in fact. *As held in Wilcox* v. *Jackson* (*13 Peters, 498*) *land must be 'legally appropriated' in order to its severance from the mass of public lands.*" (Emphasis ours.)

In *Shurtleff* v. *Kelly, et al* (4 L. D. 448), Shurtleff applied to make homestead entry of land embraced in a timber culture entry which the records of the Land Department showed was void. In sustaining Shurtleff's application the Secretary said:

> "I am of the opinion that the ruling of your office, that Shurtleff could derive no benefit from his said application during the existence of the said entry of Kelly, was erroneous. *Said entry being a second timber culture entry in a section was, for that reason, prima facie void. If void, it was no segregation or appropriation of the land embraced in it.*" (Emphasis ours.)

In Jeremiah H. Murphy (4 L. D. 467, 468), the Land Department records showed that Murphy was allowed to make an entry at a time (February 6, 1884) when the land was not subject to entry. When it became subject to entry (May 20, 1884) Murphy filed a second application for entry which was rejected,

for the stated reason that the entry he made on February 6, 1884, "was intact on the records." The Secretary said:

> * * * "the entry of Murphy, of February 6, *being erroneously allowed, was as you decided illegal and void ab initio. A void act is an absolute nullity, and has no force or effect whatever.* Therefore Murphy's entry of February 6 was not a bar to his application of May 20, *and it was not necessary that his first entry should be finally cancelled to authorize his second application.* This principle is fully announced in the case of David Litz (3 L. D., 181). The decision of your office is therefore reversed, and Murphy's application will be allowed." (Emphasis ours.)

V.

RESPONDENT WAS IN ACTUAL OCCUPANCY, AS A QUALIFIED SETTLER UNDER THE HOMESTEAD LAWS, FROM 1906 TO 1917.

The Oklahoma Supreme Court found and concluded, as follows (R. 52):

> "We know of no way by which plaintiff may have estopped himself to set up the invalidity of his attempted entry of March 3, 1902, unless it be by some deceitful conduct or some misrepresentation that has misled the defendant to his disadvantage as to the facts. But it appears that early in the contest proceeding, plaintiff was asserting his right under his attempted entry of July 2d, 1906, and asserting that his entry of March, 1902, was void. This matter was decided against plaintiff upon appeal and decided upon the erroneous theory that his original void entry had been subsequently validated. *The facts surrounding this matter were well known to all of the parties involved and were apparent of record, of which record,*

> *the defendant, Lowe, was bound to take notice.* Again, it is urged, that plaintiff has been guilty of such laches as should bar this action. We are unable to so find. *Plaintiff occupied the land under his claim until the year 1917.* This action was begun on July 19, 1917; defendant received his final certificate on July 19, 1917. We are therefore of opinion that the original entry of March 3, 1902, was void, and following the law, as announced in *Prosser* v. *Finn, supra*, that this (fol. 284) void entry was not therefore validated by *the continued possession of the land thereunder after he had become qualified by law to make a valid entry*, and that the holding of the Department that such void entry was thereafter validated was error. It follows that in July, 1906, the land was open for entry." (Emphasis ours.)

Respondent's void entry of March 3, 1902, was "cancelled" by the Interior Department under petitioner's husband's "contest" on July 30, 1910. The land was not then unappropriated public land. As found by the lower court, it was then, and had been since 1906, in the actual occupancy of the respondent, who continued in occupation until 1917. Therefore, when petitioner's husband made homestead entry in 1910, he entered appropriated public land—appropriated by the respondent through his occupancy of it in reliance upon the validity of his application for entry, filed on July 2, 1906.

If the aforesaid application of July 2, 1906, was invalid, what caused it to be invalid? Certainly it was not invalid merely because filed during pendency of petitioner's husband's "contest." That "contest," as we contend, was a nullity. It was a nullity because, as we further contend, the entry against which it was directed was a nullity. In other words, as there was no

entry, there could not be a contest. And these contentions, if sound, render obviously sound the proposition that the land in suit was open and unappropriated public land when the respondent, *with notice to petitioner's husband of reliance by respondent upon the application he filed on July 2, 1906*, went into occupancy in 1906 and remained in occupancy until 1917.

When respondent was informed by counsel that the inadvertently allowed entry was void, he immediately made application for entry, doing so on July 2, 1906. That application was a disclaimer under the inadvertently allowed entry. It was notice to petitioner's husband and to the Land Department of a claim to the land by the respondent utterly inconsistent with any claim thereto under the inadvertently allowed entry. As found by the State Supreme Court: "The facts surrounding this matter were well known to all of the parties involved." *They were also well known to the Land Department before it rendered any decision in the "contest" proceeding against the void entry.* (R. 40 and 41.) And being well known to the said Department at that time, its duty with respect to them was evident, although not performed, viz, to declare the inadvertently allowed entry void. But instead of declaring it void, the Department "held that Dickson's entry was validated by the act of May 22, 1902." (R. 40 and 41.)

CONCLUSION.

SENIORITY OF VALID CLAIM AND RESULTANT PRIORITY OF RIGHT HAVE ALWAYS BEEN WITH THE RESPONDENT.

Very early in the proceedings under the "contest" against the void entry, the petitioner's husband be-

came apprized of the facts which demonstrated that such entry was a nullity. The Supreme Court of Oklahoma remarked that "the facts surrounding this matter were well known to all the parties involved and were apparent of record, of which record the defendant Lowe was bound to take notice." (R. 52.) Notwithstanding the petitioner's husband's knowledge of such facts, the prosecution of his "contest" against the void entry was continued. Moreover, early in the proceeding under the contest, the petitioner here became apprized of the fact that in July, 1906, the respondent not only applied for an entry of the land that was described in the void entry but had entered into occupancy of it under the second homestead entry act of 1902.

A contestant is an informer. He seeks a reward for bringing to the notice of the land department matters of fact which are not shown by the records of that department. The reward sought is the preference right of entry conferred by the second section of the act of May 14, 1880, c. 89, 21 Stat. 140, a right which accrues only after cancellation of an entry as a consequence of proceedings under a contest. The information which the petitioner imparted to the Land Department under his contest against the void entry was not essential to a judgment of "cancellation" of that entry. Such entry should have been "cancelled" without being contested, and would have been "cancelled" without being contested, if the Land Department had performed its duty with respect to it.

But that department chose to "cancel" the entry upon proof adduced by the contestant that respondent had not done what he was without any obligation whatever to do, namely, reside upon and cultivate land described in a void homestead entry, rather than upon the

basis of those facts (showing the entry to be void *ab initio*) of which the Interior Department had judicial notice through many years that antedated the bringing of the "contest."

The respondent applied for entry upon the sound basis that the void entry of 1902 was inoperative and ineffective to remove the land from the class of unappropriated, vacant public land open to homestead entry and settlement. The petitioner claimed under a preference right as a contestant, a right which can not accrue until after "cancellation" of the entry contested. His alleged right, therefore, accrued in July, 1910, when the void entry was "cancelled." *The respondent claimed under both an application to enter which he filed in July, 1906, and a settlement upon the land which, as the Supreme Court of Oklahoma found, was begun in 1906 and continued until 1917.*

Hence the respondent's right as an applicant and actual settler accrued four years before accrual of the alleged right of the petitioner as a successful contestant. From which it is manifest that seniority of claim, and resultant priority of right, have always been with the respondent.

Respectfully submitted,

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